Internet Archive sued by record labels as battle with book publishers intensifies

Music copyright bomb hits just as other court conflict leads to lending limits

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The Internet Archive was sued for copyright infringement by a coalition of music giants on Friday, just as it lost a similar copyright claim to a group of book goliaths.

The latest lawsuit [PDF] against the non-profit organization was filed in a federal district court in New York City by UMG Recordings, Capitol Records, Concord Bicycle Assets, CMGI Recorded Music Assets, Sony Music, and Arista Music.

It claims the Internet Archive, founder Brewster Kahle, the Kahle/Austin Foundation, audio archivist George Blood, and the archiving service operating under Blood's name violated the respective music companies' copyrights by digitizing and distributing online audio files transferred from old 78 RPM recordings.

"The real idea of this is preservation, research, and discovery," said Brewster Kahle, director and co-founder of the Internet Archive, during a presentation about the project in 2017.

The music companies argue otherwise.

"Defendants attempt to defend their wholesale theft of generations of music under the guise of 'preservation and research,' but this is a smokescreen: their activities far exceed those limited purposes," the complaint contends. "Internet Archive unabashedly seeks to provide free and unlimited access to music for everyone, regardless of copyright."

The Internet Archive's Great 78 Project boasts over 400,000 recordings. The exhibit list [PDF] accompanying the complaint identifies 2,749 songs controlled by the plaintiff companies. Among them are songs by artists such as Frank Sinatra, Thelonious Monk, Ella Fitzgerald, Billie Holiday, Miles Davis, and Louis Armstrong.

"Now the Washington lawyers want to destroy digital collections of scratchy 78 rpm records, 70-120 years old, built by dedicated preservationists online since 2006," said Kahle, via Twitter.

UMG did not respond to a request for comment.

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As the music litigation gets underway, the Internet Archive on Friday entered into a consent decree with a group of book publishers – the Hachette Book Group, HarperCollins Publishers, John Wiley & Sons and Penguin Random House – that limits the Internet Archive's lending of digital copies of the physical books it possesses.

The publishers' lawsuit, filed in 2020 shortly after the debut of the Internet Archive's National Emergency Library, challenged this so-called "controlled digital lending" program. "It is a lend-like-print system where the library loans out a digital version of a book it owns to one reader at a time, using the same technical protections that publishers use to prevent further redistribution," the Internet Archive explained at the time.

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The conceit here is that electronic lending of this sort doesn't violate anyone's copyright because each digital instance of a book is backed by a physical copy in the library's collection, or so it was hoped. As the archive said, it lent out one digital copy for each of its physically owned books at a time to people.

The Internet Archive claimed this program qualified for the fair use defense under US copyright law because it was transformative, one of the factors considered to determine whether fair use applies. But in March, Judge John Koeltl in New York City rejected that argument.

As a result, the two parties wrote [PDF] to Judge Koeltl on Friday to obtain approval for a proposal that restricts the digital book lending program and calls for confidential financial compensation – if an appeal by the non-profit fails.

The publishers identified 127 copyrighted books in their court filings, so statutory damages, at up to $150,000 per work for willful infringement, could exceed $19 million. That's more than half the organization's 2019 budget of $36.7 million. The actual negotiated figure is probably significantly lower than that, however.

On Monday, Judge Koeltl signed an order [PDF] endorsing the consent decree and sided with the Internet Archive on one unresolved detail: he accepted the archive's definition of books covered by the agreement.

As a result of this decree, the Internet Archive cannot distribute any books under copyright from the publishers that are commercially available in any electronic text format. The non-profit can still distribute digital versions of texts that have not been commercially digitized and exist only on paper – a category the publishers wanted to include in the terms of the consent decree.

So to be clear: the Internet Archive has entered a court-approved pact with publishers in which it promises to limit its lending of books as stated above, though it will appeal this outcome in the hope it can do away with the decree entirely.

"Libraries are under attack at unprecedented scale today, from book bans to defunding to overzealous lawsuits like the one brought against our library," said Kahle in a statement. "These efforts are cutting off the public's access to truth at a key time in our democracy. We must have strong libraries, which is why we are appealing this decision."

Chris Freeland, director of library services at Internet Archive, said the organization also plans to clarify with the courts the agreed-upon changes to its digital lending program; the Internet Archive has 30 days to certify that it has complied with the court-ordered permanent injunction.

Hachette Book Group did not immediately respond to a request for comment. ®

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